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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
Distribution of the	)	**Docket No. 14-CRB-0010-CD (2010-13)**
2010, 2011, 2012, and 2013 Cable Royalty Funds	)	

PROGRAM SUPPLIERS' REQUEST FOR REHEARING OF THE INITIAL DETERMINATION OF ROYALTY ALLOCATION

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
Mitchell Silberberg & Knupp LLP
1818 N Street NW, 7th Floor
Washington, DC 20036
(202) 355-7917 (Telephone)
(202) 355-7887 (Facsimile)
goo@msk.com
lhp@msk.com
amd@msk.com

Attorneys for
Program Suppliers

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PROGRAM SUPPLIERS' REQUEST FOR REHEARING OF THE INITIAL DETERMINATION OF ROYALTY ALLOCATION

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. §§ 353.1-2, the Motion Picture Association of America, Inc. ("MPAA"), its member companies, and other producers and/or distributors of syndicated movies, series, specials, and non-team sports broadcast by television stations ("Program Suppliers"), hereby move for rehearing of the *Initial Determination Of Royalty Allocation* issued by the Copyright Royalty Judges ("Judges") on October 18, 2018 ("2010-13 Decision").

I. Summary Statement Of Legal Errors In The 2010-13 Decision

As required by the Judges' regulations, Program Suppliers submit the following brief summary statement regarding the aspects of the 2010-13 Decision that are "without evidentiary support in the record or contrary to legal requirements."[1]

1. It was contrary to precedent and legal error for the Judges to adopt the Crawford fees-based regression analysis as a starting point for royalty allocations. Prior decisions and the record in this proceeding support limited use of the fees-based regression analysis as corroborative evidence and not as a primary allocation methodology.

2. It was legal error to rely on the Crawford regression analysis as a basis for royalty allocations because none of the expert economists who testified in this proceeding were able to independently replicate the Crawford results.

3. It was legal error to fail to articulate a reasoned basis for the defined ranges of reasonableness set for each party's royalty award and for the determination of each party's shares within those ranges, and to fail to connect those shares to the evidentiary record in this proceeding.

[1] *See* 37 C.F.R. § 353.2.

4. It was legal error to apply an upward adjustment to the royalty awards for certain claimants as a means of bridging the disparity between the Crawford regression point estimates and other record evidence, but not do so for all affected claimants. In making such adjustments, the Judges ignored contradictory record evidence and improperly treated similarly situated claimants differently.

5. It was legal error to ignore evidence of Program Suppliers' overwhelming majority share of the Horowitz Survey's Other Sports category and to reallocate Other Sports category shares to non-entitled program categories.

6. It was legal error and a manifest injustice to exclude Program Suppliers' corrected testimony regarding WGNA viewing data and the related analysis, but permit other parties to submit corrected testimonies.

7. It was legal error for the Judges to fail to consider or address Program Suppliers' changed circumstances evidence regarding sports migration, which was presented in the written testimony of John Mansell (Exhibit 6002), while changed circumstances evidence presented by other claimant groups was considered.

II. Legal Standards Governing The Judges' 2010-13 Decision And Rehearing

The Judges' determinations must not violate the arbitrary and capricious standard of the Administrative Procedure Act.[2] Accordingly, the Judges' decisions must not be arbitrary, contrary to law, or not based on substantial evidence.[3] The D.C. Circuit has held that the Judges are obligated to make reasoned decisions supported by the written record before them, which "requires more than an absence of contrary evidence; it requires substantial evidence to support a

[2] *See* 17 U.S.C. § 803(d)(3) (incorporating by reference 5 U.S.C. § 706).
[3] *See Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1114 (D.C. Cir. 2015).

decision."[4] The Judges are also required to "act on the basis of" prior "determinations and interpretations" by the Copyright Royalty Tribunal, the Copyright Arbitration Royalty Panel, and the Judges."[5] While the D.C. Circuit has held that the Judges can depart from precedent, when doing so they must acknowledge the departure and provide a reasoned explanation.[6] Finally, the Judges' approach to allocation, and the shares adopted, must be supported by substantial record evidence presented by the parties and should not be "first presented in the Judges' determination and not advanced by any participant."[7]

The Copyright Act permits the Judges to grant rehearing after a determination.[8] The Judges have discretion to grant a motion for rehearing "upon a showing that any aspect of the determination may be erroneous."[9] A party seeking rehearing must identify the aspects of the determination that are either "without evidentiary support in the record" or "contrary to legal requirements."[10] Program Suppliers request rehearing because (1) there is a need to correct a clear error, and (2) there is a need to prevent manifest injustice.[11]

Program Suppliers raise seven separate bases for rehearing in this proceeding, each of which is discussed below in as much detail as possible within the page limitations imposed on requests for rehearing in the Judges' regulations.[12]

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[4] *See id*. at 1121 (citing *Intercollegiate Broad. Sys. Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 87 (D.C. Cir. 2009)).
[5] 17 U.S.C. §803(a)(1).
[6] *See Music Choice v. Copyright Royalty Bd*., 774 F.3d 1000, 1014 (D.C. Cir. 2014); *Intercollegiate Broad. Sys., Inc. v.*, 574 F.3d 748, 762; *see also Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005).
[7] *See Settling Devotional Claimants*, 797 F.3d at 1121 (citing *Intercollegiate*, 571 F.3d at 87).
[8] *See* 17 U.S.C. § 803(c)(2).
[9] 37 C.F.R. § 353.1.
[10] 37 C.F.R. § 353.2.
[11] *See Order Granting In Part And Denying In Part Sirius XM's Motion For Rehearing And Denying Music Choice's Motion For Rehearing*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022) at 2 (April 18, 2018) (citing *Order Denying Motion For Rehearing*, Docket No. 2006-1 CRB DSTRA at 1 (Jan. 8, 2008)).
[12] *See* 37 C.F.R. § 353.2 (imposing a ten page limit on motions for rehearing). Should the Judges require additional briefing on any issue identified in this pleading, Program Suppliers will supplement this motion with additional argument and evidence, as directed by the Judges.

A. Neither Precedent, Nor The Record, Supported Reliance On The Crawford Fees-based Regression As A Starting Point For Royalty Allocations.

The Judges' reliance on Dr. Crawford's duplicate-minutes regression analysis as the "starting point" for allocating royalties[13] was clear legal error. This approach was a clear departure from precedent. The Judges not only failed to acknowledge their departure from precedent in the 2010-13 Decision,[14] they also failed to provide a reasoned explanation for the departure.

Precedent dictates that reliance on a fees-based, Waldfogel-type regression analysis is limited to possible use to corroborate survey results, not for use as the primary allocation methodology.[15] In the 2004-05 Decision, the Judges expressly concluded that, unlike survey evidence, a Waldfogel-type analysis "does not purport to analyze data free from the strictures of the regulated market because the payment pools analyzed ultimately are impacted by the fee structure set in the regulated market."[16] Accordingly, the Judges concluded that the usefulness of a Waldfogel-type regression analysis is limited to rough corroboration of survey results.[17] Since neither the Judges nor their predecessors previously relied on Waldfogel-type regression analyses as the starting point for allocating royalties, the Judges were required to describe the "changed circumstances" or point to "other record evidence"[18] that required using Crawford's regression analysis as the *primary* basis for allocating royalty shares in this proceeding. The Judges, however, failed to do so.

[13] 2010-13 Decision at 119.
[14] *See id.* at 12 ("The Judges have found previously that Waldfogel-type regressions are relevant in cable distribution proceedings and find nothing in . . . the current proceeding to support changing that position.").
[15] Distribution of 2004 and 2005 Cable Royalty Funds, Distribution Order, 75 Fed. Reg. 57063, 57069 (Sept. 17, 2010) ("2004-05 Decision").
[16] 2004-05 Decision at 57068.
[17] *Id.* at 57069.
[18] 2010-13 Decision at 12, 96.

Further, it was legal error for the Judges to rely primarily on Crawford's regression analysis because it is essentially a combination of two metrics that have been consistently rejected by the Judges and their predecessors as direct evidence of relative market value in a hypothetical, unregulated market: tonnage and royalty fees paid under the Section 111 statutory scheme (*i.e.*, fees-generated). The Judges and their predecessors have consistently rejected volume, or tonnage, of retransmitted programming as equal to value.[19] Moreover, precedent is clear that the relationship between fees-generated and the overall hypothetical marketplace value of programming is "wobbly."[20] By relying on the tonnage and fees-generated Crawford analysis as a starting point, the Judges departed from precedent without either acknowledging the departure or providing a reasoned explanation for the change in their methodological approach.

B. The Record Demonstrated That The Crawford Regression Analysis Could Not Be Replicated.

The Judges' reliance on Crawford's duplicate minutes regression analysis was legal error because record evidence demonstrated that Crawford's analysis could not be replicated by any expert economist who attempted replication. It is well established that a "key question" to be resolved in determining whether expert testimony is sufficiently reliable is whether a proposed scientific theory or technique "can be (and has been) tested."[21] Here, both Drs. Gray and Erdem

[19] Time-based valuation methodologies consistently have been rejected by previous panels. *See* 45 Fed. Reg. 63026, 63037 (Sept. 23, 1980) ("We conclude that an allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market considerations and produce a distorted value of programming."); 47 Fed. Reg. 9879, 9897 (Mar. 8, 1982) ("We reaffirm our finding that time based formulas do not provide useful guidance for our distribution functions."); 51 Fed. Reg. 12792, 12813 (Apr. 15, 1986) ("We again reject any time-based formula, for, as we have said, they only serve to distort any marketplace analysis."); 69 Fed. Reg. 3606, 3616 (Jan. 26, 2004) (recognizing that "attempt[ing] to equate relative programming volume with relative programming value" is a "fundamental infirmity").

[20] *See* 2004-05 Decision at 57072; 75 Fed. Reg. 26798, 26802-03 (May 12, 2010) (discussing the history of fees generation); *see also* 69 Fed. Reg. at 3617-18.

[21] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 579, 592 (1993); *see also Zenith Electronics Corp. v. WH–TV Broadcasting Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) ("Someone else using the same data and methods must be able to replicate the result.").

testified that they were unable to independently replicate Crawford's analysis.[22] This lack of independent replication strongly weighs against the reliability of Crawford's methodology. Consequently, his methodology should not have been considered at all, let alone as a starting point for royalty allocations.[23]

C. Neither The Judges' Calculated Ranges Of Reasonable Royalty Awards Nor The Royalty Awards Are Reasonably Explained Or Connected To The Record.

Although the Judges stated in general terms the evidence they considered in developing ranges of reasonableness for their allocated royalty shares, they neither articulated a reasoned basis for the defined number ranges for each party's royalty award set forth in the 2010-13 Decision,[24] nor explained how they determined each party's shares within those ranges. The D.C. Circuit has expressly held that the Judges cannot allocate royalties by "simply picking a number." [25] Rather, the Judges are required to provide a reasoned justification for why they picked the number, which must be supported by substantial evidence.[26]

Here, the Judges concluded that the Horowitz Survey and Crawford analysis, when adjusted to account for their respective methodological limitations, "are the best available measures of relative value."[27] To set the ranges of reasonable allocations for each program category in each year, however, the Judges stated that they also relied on several other methodologies, including the Bortz Survey, the augmented Bortz results presented by Ms. McLaughlin, and the regression analysis presented by Dr. George.[28] The Judges provided no explanation for how they employed these additional methodologies to define the ranges of

[22] 3/14/18 Tr. 3739 (Gray); Exhibit 5007, Rebuttal Testimony of Erkan Erdem, Ph.D, at 2, 14-15, n.13.
[23] *See Ruffin v. Shaw Indus., Inc.*, 149 F.3d 294, 297-300 (4th Cir. 1998) (affirming exclusion of expert testimony where expert's method was not independently replicated).
[24] 2010-13 Decision at 119.
[25] *Settling Devotional Claimants*, 797 F.3d at 1120.
[26] *Id.* at 1121.
[27] 2010-13 Decision at 119.
[28] *Id.*

reasonableness, especially after they expressly found the Horowitz Survey and Crawford analysis to be more persuasive overall.[29] Moreover, the Judges failed to explain precisely how they calculated each party's shares within the ranges, noting only that they used Crawford's analysis as a "starting point" and made "modest upward adjustments" for the SDC and CCG categories.[30] This approach is inexplicable, given that CTV, the party presenting the Crawford analysis, did not advocate that the Judges use the Crawford duplicated minutes approach as a "starting point," or the primary basis, for royalty allocation.[31] The Judges committed legal error by failing to connect their ultimate royalty allocation shares with the record evidence presented by the parties in this proceeding.[32]

D. The Judges' Royalty Share Adjustments Were Arbitrary.

In adjusting the parties' royalty shares, the Judges (1) failed to consider all record evidence, and (2) improperly treated similarly situated claimants differently, without explanation, and thus committed legal error. The record evidence established that the Crawford regression results were roughly corroborative of the Horowitz Survey for only CTV and JSC.[33] Thus, for Program Suppliers and the three remaining parties, the Crawford regression results and the Horowitz Survey results, even as adjusted by the Judges, were widely disparate.[34] The Judges made upward adjustments to SDC's shares in recognition of the disparity between SDC's

[29] *Id*. Based on the text of the 2010-13 Decision, Program Suppliers are unable to determine how the Judges calculated the values representing the "minimum" and "maximum" ranges of reasonableness for each program category, or what record evidence was relied on to calculate all of the values representing each of these ranges.
[30] *Id*. Notably, the Judges' assertion that SDC's upward adjustment was "modest," is a gross understatement, as Dr. Crawford's analysis allocated an average of only 0.69% of royalties to SDC, while the Judges allocated an average royalty share of 5.25% to SDC, reflecting a 600% increase over Dr. Crawford's proposed Devotional category shares.
[31] CTV took the position that "the Bortz shares for CTV are an appropriate starting point." *See* CTV PCL 239.
[32] *Settling Devotional Claimants*, 797 F.3d at 1121 ("A reasoned justification . . . 'requires substantial evidence to support a decision.'") (quoting *Intercollegiate*, 571 F.3d at 87).
[33] *Compare* 2010-13 Decision at 15, Table 2, *with id.* at 67, Table 12.
[34] *Id.*

Crawford regression point estimates and its Horowitz Survey results. They also adjusted CCG's shares upward based on other record evidence.[35] However, the Judges made no upward adjustment to Program Suppliers' shares, notwithstanding the significant disparity between its Horowitz Survey shares and Crawford regression results. The Judges also provided no reasoned basis for their disparate treatment of Program Suppliers as compared with SDC and CCG. The Horowitz Survey, which was sponsored by Program Suppliers, and which the Judges indicated presented one of the "best available measures of relative value,"[36] compelled an upward adjustment to Program Suppliers' shares, especially in light of the adjustments the Judges made for other program categories.[37] Failure to do so was clear legal error.

E. The Judges' Reallocation Of The Other Sports Category Among All Program Categories Was Erroneous.

The Judges' decision to reallocate the Horowitz Survey shares attributable to the Other Sports category shares among all program categories was legal error.[38] The record evidence was clear that only Program Suppliers and CTV could have had programming attributable to the Other Sports category.[39] In fact, Program Suppliers provided evidence of its share of the vast majority of programs that fell within the Other Sports category.[40] Reallocation of Other Sports

[35] 2010-13 Decision at 119.
[36] *Id.* at 119.
[37] Indeed, the shares awarded Program Suppliers in the 2010-13 Decision are actually *lower* each royalty year than *either* the shares calculated under the Crawford duplicate analysis point estimates (which the Judges purport to rely on) and the Crawford non-duplicate analysis estimates (which the Judges purport to reject). *Compare* 2010-13 Decision at 15-16, Tables 2 and 3, *with id.* at 120, Table 19. The Horowitz Survey compelled an upward adjustment to the Program Suppliers share over the Crawford point estimates, not a downward departure below those point estimates. The Horowitz Survey also compelled a downward adjustment to the PTV shares. *See* 2010-13 Decision at 80.
[38] 2010-13 Decision at 79.
[39] Indeed, the Judges have acknowledged that only Program Suppliers and CTV could have had programs in the "Other Sports" category. *See, e.g.*, 2010-13 Decision at 67 n.117, 74.
[40] Ex. 6037, Rebuttal Testimony of Jeffrey S. Gray, Ph.D., at ¶ 65; Proposed Findings of Fact and Conclusions of Law of Program Suppliers, at ¶ 265 (Apr. 5, 2018).

shares to program categories that, by definition, could not claim programming falling within the Horowitz Survey's Other Sports category[41] was erroneous.

F. The Judges' Exclusion Of Program Suppliers' Corrected Nielsen Data Was Improper.

The Judges clearly erred by excluding Program Suppliers' corrected testimony from Dr. Gray contained in their *Third Errata to Amended And Corrected Written Direct Statement and Second Errata to Written Rebuttal Statement Regarding Allocation Methodologies* (Jan. 22, 2018) ("Third Errata"), which corrected the Nielsen viewing data error related to WGNA.[42] The exclusion of Program Suppliers' correction effectively resulted in the rejection of Dr. Gray's related viewing analysis[43] and was arbitrary, particularly when the Judges routinely permitted every single party to this proceeding to submit corrections to written direct and/or written rebuttal testimonies without motion throughout the proceeding.[44] The disparate treatment accorded Program Suppliers' correction was both erroneous and a manifest injustice.

Moreover, the Judges' exclusion of Dr. Gray's corrected testimony is particularly arbitrary because each party, with the Judges' permission, submitted amended written rebuttal statements that fully addressed Dr. Gray's corrected testimony. Thus, no party would have been prejudiced by admission of Dr. Gray's corrected testimony.[45] Indeed, courts have declined to impose the harsh remedy of exclusion of an allegedly untimely expert report where, as is the case here, the interests of justice are better served by allowing the party to admit the expert report,

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[41] *See* 2010-13 Decision at 1 n.1.
[42] *See generally Third Errata*.
[43] *See* 2010-13 Decision at 98.
[44] *See, e.g., Program Suppliers' Response in Opposition to the SDC's Motion to Strike Program Suppliers' Errata to the Testimony of Dr. Jeffrey S. Gray* at 5 (Feb. 2, 2018) (citing examples of corrections to written direct and/or written rebuttal testimonies submitted by parties without motion during this proceeding).
[45] *See generally Order Continuing Hearing And Permitting Amended Written Rebuttal Statements, Denying Other Motions, And Reserving Ruling On Other Requests* (Jan. 26, 2018).

even if it causes a minor delay in the proceedings.[46] Program Suppliers' Third Errata clearly satisfied this standard, and its exclusion was erroneous.

G. The Judges Failed To Consider Or Address Program Suppliers' Changed Circumstances Evidence Regarding Sports Migration.

Although the Judges considered changed circumstances evidence presented by other parties,[47] they failed to consider the testimony of Program Suppliers witness John Mansell (Exhibit 6002). Mr. Mansell presented evidence of changed circumstances showing the significant migration of valuable live professional and college team sports from broadcast television to cable networks during the relevant years. The overwhelming reduction in available JSC content on broadcast signals during the pertinent years was not only compelling evidence supporting a reduction in JSC's royalty share award,[48] it was directly contradictory to the Judges' conclusions that JSC was entitled to a "significant share . . . even though the shares are disproportionate to the number of programming hours retransmitted."[49] However, the Judges failed to discuss, or even provide a citation to, Mr. Mansell's testimony at any point in the 2010-13 Decision. This was erroneous.[50]

III. Conclusion

For all of the foregoing reasons, the Judges should grant Program Suppliers' motion for rehearing of the 2010-13 Decision.

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[46] *See, e.g., Richardson v. Korson*, 905 F. Supp. 2d 193, 200 (D.D.C. 2012) ("Because preclusion of evidence is an extreme sanction, . . . a court 'must consider less drastic responses' before imposing this sanction.") (citations omitted); *Dippel v. Farrell Lines Inc.*, No. 03 CIV. 130 (PKL), 2004 WL 369140, at *2 (S.D.N.Y. Feb. 27, 2004) (declining to exclude expert report that was submitted outside court's deadlines where, among other things, "the interests of justice are better served by permitting plaintiff to disclose the expert report and seek to admit it").
[47] *See, e.g.*, 2010-13 Decision at 75-76, 102-103, 119 n.204.
[48] *See also Proposed Findings of Fact and Conclusions of Law of Program Suppliers*, at ¶¶ 286-291 (Apr. 5, 2018).
[49] 2010-13 Decision at 119 n.204.
[50] The Judges must make their determinations based on substantial evidence, taking "into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Respectfully submitted,

/s/ Gregory O. Olaniran

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
Mitchell Silberberg & Knupp LLP
1818 N Street NW, 7th Floor
Washington, DC 20036
(202) 355-7917 (Telephone)
(202) 355-7887 (Facsimile)
goo@msk.com
lhp@msk.com
amd@msk.com

Attorneys for
Program Suppliers

November 2, 2018

Proof of Delivery

I hereby certify that on Friday, November 02, 2018 I provided a true and correct copy of the Program Suppliers' Request For Rehearing Of The Initial Determination Of Royalty Allocation to the following:

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

Joint Sports Claimants, represented by Michael E Kientzle served via Electronic Service at michael.kientzle@apks.com

Devotional Claimants, represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

Commercial Television Claimants (CTC), represented by John Stewart served via Electronic Service at jstewart@crowell.com

Public Television Claimants (PTC), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Signed: /s/ Lucy H Plovnick